Supreme Court, U.S.
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No. 85-222

In the Supreme Court of the United States

OCTOBER TERM, 1985

WAYNE K. BAKER, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the civil penalty assessment provisions of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, are unconstitutional.

1. Section 518 of SMCRA, 30 U.S.C. 1268, empowers the Secretary of the Interior to impose civil penalties against mine operators for violations of the Act. It provides that the Secretary may assess civil penalties (and shall assess such penalties where a cessation order has been issued) in an amount not greater than $5,000 for each violation. 30 U.S.C. 1268(a). In addition, the Secretary shall assess civil penalties for uncorrected violations in an amount not less than $750 for each day that a violation continues. 30 U.S.C. 1268(h). Such penalties may be assessed "only after the person charged with a violation * * * has been given an opportunity for a public hearing" which "shall be of record

and shall be subject to [the Administrative Procedure Act]." 30 U.S.C. 1268(b).

Section 518(c) requires a refundable prepayment of penalties prior to the hearing. It provides that, after the Secretary informs the operator of the violation and the proposed amount of the penalty, "[t]he person charged with the penalty shall then have thirty days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account." 30 U.S.C. 1268(c). Should the operator prevail in whole or in part in the administrative proceedings or on judicial review, the deposited funds or the appropriate part of them must be returned with interest. *Ibid.* "Failure to forward the money to the Secretary within thirty days," however, "shall result in a waiver of all legal rights to contest the violation or the amount of the penalty." *Ibid.*

Federal inspections revealed that petitioner had violated SMCRA's surface reclamation requirements (Pet. App. 21). Petitioner received notice of the violations and the proposed penalties but failed to avail himself of the statutory procedures for review of the penalty assessment (*id.* at 21-23). The government therefore brought a civil action to collect the penalties (*id.* at 20). The district court found that petitioner received adequate notice of the violations (*id.* at 23-25). It also rejected petitioner's counterclaim that Section 518(c)'s prepayment requirement violated the Fifth Amendment's guarantee of procedural due process (*id.* at 25-26). The court of appeals affirmed in an unpublished memorandum opinion (*id.* at 17-19). The court adhered to its determination, in *Graham* v. *Office of Surface Mining Reclamation & Enforcement*, 722 F.2d 1106 (3d Cir. 1983), that Section 518(c) complied with the Fifth Amendment's due process requirements.

2. The judgment of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Therefore, further review by this Court is not warranted.

Petitioner's claim that the prepayment requirement of Section 518(c) is unconstitutional has been rejected by every court of appeals that has considered it. *Graham* v. *Office of Surface Mining Reclamation & Enforcement*, 722 F.2d at 1111; *Blackhawk Mining Co.* v. *Andrus*, 711 F.2d 753, 757-758 (6th Cir. 1983); *B & M Coal Corp.* v. *Office of Surface Mining Reclamation & Enforcement*, 699 F.2d 381, 384-386 (7th Cir. 1983). Each of these courts correctly applied the criteria set forth in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), for determining the procedural adequacy of the administrative scheme.

This Court has thrice refused to consider identical challenges to the constitutionality of Section 518(c). *United States* v. *Crews*, 740 F.2d 969 (6th Cir. 1984) (Table), cert. denied, No. 84-749 (Jan. 14, 1985); *United States* v. *Moore*, 734 F.2d 17 (6th Cir. 1984) (Table), cert. denied, No. 84-41 (Oct. 9, 1984); *United States* v. *D.C. Coal Co.*, 705 F.2d 459 (6th Cir. 1982) (Table), cert. denied, 460 U.S. 1083 (1983). There is no new reason for this Court to consider the issue on this occasion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

OCTOBER 1985